IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

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CIVIL SECOND APPEAL No. 83 of 1989

RAM KUMAR

V/S

SUKHA RAM

Mr. RR NAGORI, for the appellant / petitioner

Mr. RK SONI for Mr. IR CHOUDHARY, for the respondent

Date of Order : 11.12.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

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This appeal has been filed by the defendant, against the judgments and decrees of the two learned courts below, decreeing the plaintiff's suit for perpetual injunction, holding the plaintiff to be entitled to possession of the land marked by “E F H I” in Ex.-4, and directing the removal of the construction existing on the said land, and also issuing perpetual injunction, restraining the defendants from raising construction, or interfering on, the land “E F H I”.

The facts of the case are, that on 11.2.75 the plaintiff filed the present suit, alleging interalia that in Godaro Ka Bas, Beethan, the plaintiff and his son are in possession of a house and behind that house 2 ½ ft. land is also of the ownership and possession of the plaintiff. The plaintiff produced a site plan, wherein house has been

shown by figure “B E F G”, and Chabutri in front thereof by “A B C D”, and the land behind the house is shown by “E F H I”. It was alleged, that the property was purchased from Parasmal Mahajan on Jeth Sud 11 Samvat 2021, and took possession that day itself, and registration was affected on 10.2.75. The house is said to be a Pucka two storied house, and on the rear side, land is said to exist, on which there is wall “E I”, and on “F H” foundations are filled, and there are four windows in the rear side, being “J K L M” with Chhajja, and above the windows are ventilators “N O P Q”. It was also alleged that in the rear wall there is Aala marked “V”. It was then alleged that the plaintiff had gone to graze the cattle at Dist. Sagar in M.P., and in his absence, on 15.1.75, with an intention to grab the land “E F H I”, the defendant constructed a new wall “S R” on the plaintiff's wall, and placed stone slabs to cover it at the Seal level of the window “J”, and also raised wall “U T”, and constructed Chabutari unauthorisedly. Loss of right of privacy and loss of right of light and air was also alleged. Interalia with these pleading, that decree was claimed, for removal of the wall and roofing slabs, and Chabutari, and for perpetual injunction restraining the defendants from raising any construction on the land “E F H I” belonging to the plaintiff.

The defendant filed a written statement on 23.8.75

and contested the suit. It was admitted that there is a house of possession of plaintiff, and his son Baksha Ram. It was denied that on the rear side, land belongs to or is in possession, of the plaintiff, rather the land "E F H I" was claimed by the defendant to be his own, having been purchased from Gheesa Dholi on 5.2.74, by registered sale deed. It was pleaded that this part of the land did not belong to Parasmal, therefore, even if Parasmal has executed any sale deed with respect to this land, that is only collusive and without authority. It was contended that Parasmal could not deliver possession of the land to the plaintiff, nor it was so delivered, rather in order to grab the land the plaintiff has introduced Parasmal, otherwise there was no occasion for getting the document registered after 11 years. Existence of any Pucka wall "E I" of the plaintiff was denied, likewise existence of filled foundation "F H" was also denied. Regarding window and ventilator, it was contended that some 5-6 years ago they were erected anew, in absence of Gheesa, and on objection being raised by Gheesa, the plaintiff admitted his guilt and agreed, that whenever Gheesa raises construction on his land, he would close them. It was also pleaded that when the defendant purchased the land Gheesa had made the parties to meet, and the plaintiff also admitted, that whenever defendant raises construction, the plaintiff will close window and ventilator. Existence of Aaliya earlier marked "V" was admitted, and it was submitted, that apart

from that there are four more Aaliyas existing in the wall, which are closed towards the side of the plaintiff, and are open towards the defendant, and were constructed for Gheesa the predecessor of the defendant. Then it was pleaded, that the construction was raised by the defendant on 1.1.75, and in presence of the plaintiff himself, at which time the plaintiff did not raise any objection, and subsequently at the instance of other persons the false suit has been filed. It was pleaded, that the closure of window and ventilator would not diminish the light and air of the plaintiff, because towards the other side there are two windows and four ventilator, likewise light and air can be received from south also, on which side there is a public way. It was pleaded that the land at "H F U T" is the part of the Chabutari of the defendant, while "I E R S" is the part of the defendant's Saal, and the land in between is Chowk. It was denied that the defendant has encroached upon any land. It was contended that the plaintiff has no right to keep the window and ventilator opening on the defendant's land, apart from the fact, that that violates the defendant's right of privacy. In additional pleas also the plea of construction being raised in the presence of the plaintiff without any objection, was reiterated. Similarly the claim of the defendant on the land in question was also reiterated. Then, it was pleaded that the land shown to be of Parasmal, Chuna, Gheesa, defendant, and that of the plaintiff, earlier belonged to Gheesa, Chuna,

and Lachhiya jointly, who affected mutual partition, and the defendant purchased half portion of the land, falling to the share of Gheesa. Thus, the title over the land was sought to be established.

The learned trial court framed seven issues, and the crucial issue was issue no.1, being as to whether the land marked "E F H I" in the site plan is of ownership and possession of the plaintiff. Then, issue no. 5 was about acquiescence and estoppel. The other issues, being not of much significance for the present controversy, need not be gone into.

The parties led evidence, oral as well as documentary. The plaintiff produced Ex.-1 being a copy of Bahi dated Jeth Sud 11, Samvat 2021, purporting to be sale deed of the property including the land in question, the registered sale deed dt. 10.2.75 was produced as Ex.-2, then an agreement dt. 10.2.75 between Gheesa and plaintiff was produced as Ex.-3, then Ex.-4 is the site plan; while the defendant produced copy of his registered sale deed dated 5.2.74 as Ex.A-1. The learned trial court, deciding issue no.1 considered the evidence of P.W.1 about the land in question being included in the sale, and he having signed as attesting witness on Ex.-1, and about Parasmal having delivered possession to the plaintiff. Then, evidence of P.W.2 Parasmal was considered about his having

delivered possession at the time of sale and proved his signatures on Ex.1, and then executed sale deed Ex.-2. He also deposed about existence of two Aaliyas which were constructed by himself, and that after sale Sukh Ram had only constructed two rooms on the "Saal" having four windows on the land. It may be noticed that he has deposed that he does not orally remember length and breadth of the land purchased by him from Lachha of which Kacha document was got executed wherein measurements of the land are given. Then, evidence of P.W.3 Hema Ram was considered who deposed existence of two Saals and existence of four windows and has also deposed about being present at the time of sale. This witness also admitted to be father in law of plaintiff's son, and also deposed that at the time of purchase of land no documentation was effected. Then, evidence of P.W.4 Chaturbhuj was considered who is scribe of the sale deed Ex.-2 and also of Ex.-3, and noticed that he has deposed that Ex.-3 was scribed at the behest of Gheesa Dholi, whereon Gheesa appended his thumb mark in his presence, and that the thumb mark of Gheesa was verified by Parasmal and the document was attested by Baksha Ram and Shishpal singh. Then, evidence of P.W.6 plaintiff was considered, who has deposed to have purchased the house in Samvat 2021, at which time two Saals were in existence, and the land in the rear side was left open, and that on asking Gheesa Dholi gave out to have not sold this land to the plaintiff, and in that regard Gheesa executed agreement

Ex.-3, he has also deposed that Gheesa has died. Then, the evidence led on the side of the defence was also recapitulated, and it was held that the witness Ishar Singh, Parasmal and Hema Ram have deposed about existence of open land in question, and to be in possession of the plaintiff, which evidence is corroborated by Ex.-1, and the defendant also claims to have purchased the property from Gheesa who has given affidavit Ex.-3, deposing the land to be of the plaintiff. Then, admittedly Aaliya exists overlooking the disputed land; which all show that the land appears to be of the plaintiff, otherwise there was no occasion for keeping Aaliyas. Likewise, admittedly the ventilators and windows are there in the upper storey, which also corroborates the plaintiff's version, and it cannot be said, that Aaliyas were being used by Gheesu Dholi. Thus, it was concluded that from the plaintiff's evidence and the documents Ex. 1 to 3, the land is established to be of the plaintiff. Then, deciding issue no. 5, the evidence was appreciated, and it was found, that rather it appears, that at that time the plaintiff was not in the town, and thus the issue was decided against the appellant. In the result the suit was decreed as above.

In appeal the learned lower Appellate Court decided issues no. 1, 2 and 3 together. The learned lower Appellate Court considered, that the plaintiff has deposed to have purchased the property in Samvat 2021, at which

time two Saals existed, and the land in question was also purchased. Then, ventilator and windows were kept in the upper storey apartments, and also deposed about defendant having encroached upon land in question in his absence when he was in district Sagar, and on learning about this he approached Gheesa, who gave out to have not sold the land, and gave in writing Ex.-3. Then it was considered, that the evidence of this witness is corroborated by P.W.3 Hema Ram, who has deposed that when plaintiff purchased the property from Parasmal two Saals were there, and the land in question was open. Then, the plaintiff constructed upper storey. It was also deposed by P.W.3 that the property was purchased in Samvat 2021, at which time he was present, and at the time of purchase it was in possession of the plaintiff, and that the defendant purchased from Gheesa, and constructed the house, at that time the land was encroached by the defendant. Then, the evidence of P.W. 2 Parasmal was considered, to have sold the property to the plaintiff in Samvat 2021, and delivered possession including the land in question. Then, he has deposed Ex.-1 to be his holograph, and bearing his signatures C to D, and a separate sale deed was executed and registered being Ex.-2, on which his signatures have been proved by him, and was attested by Mangla and Kishna Ram who signed in his presence. Then, the evidence of P.W.4 has been considered who has deposed to be scribe of Ex.-2 and Ex.-3, and deposed Ex.-3 to be scribed at the behest of Gheesa,

whereon there is thumb mark of Gheesa, appended in his presence, and was attested by witness Baksha and Shish Pal Singh. P.W.4 Yakoob (sic P.W.5) is the person who prepared the map. Then, the evidence of P.W.7 Budha Ram has been considered who is deposed to have informed the plaintiff at District Sagar. Then, the evidence led on the side of the defence was recapitulated, and then in para-10 it was concluded, that copy of the Bahi entry Ex.-1, Sale deed Ex.-2, and the agreement Ex.-3, show the existence of 2 ½ ft. land between the house of the parties, and this land to be included in the plaintiff's land. Likewise Gheesa and Parasmal have also shown it to be the land of the plaintiff's portion, and to have been left for light and air. Thus, the above oral evidence is clearly corroborated by documentary evidence, while there is no rebuttal on the side of the defendant, as the defendant has led only oral evidence. With this it has been concluded, that this 2 ½ ft. land formed part of the land of Lichhman, and was sold by Lichhman to Parasmal, and Parasmal sold it to the plaintiff. Thus, this land is established to be of the plaintiff, whereas the defendant has failed to establish having any right over this land. The learned lower Appellate Court has also found, that the defendant has taken possession of this land, and raised construction, for which he was not entitled. Both these issues were found in favour of the plaintiff, and the plaintiff was held to be entitled to mandatory injunction and possession also. Thus,

the finding of the learned trial court was affirmed. The findings on other issues were also affirmed, and the appeal has been dismissed.

This appeal was admitted by framing following substantial question of law:-

> "Whether the Court below misread the evidence on record, and considered the inadmissible evidence?"

Arguing the appeal, learned counsel for the appellant took me through the entire record, including pleading, documents and the statements, and submitted, that Parasmal had admitted, that he purchased the land from Lachhman, and in that document measurements of land was given, but then, that document has not been produced. Thus, the chain of documents has not been produced, whereby the plaintiff may be shown to have acquired a valid title. Learned counsel also referred to the statement of Parasmal P.W.2, who has deposed in cross examination that in Ex.-1 measurements are not mentioned because at that time his Bahi was in Borunda, while Ex.-1 is the plaintiff's Bahi, and measurements are written in witness' Bahi. He has also admitted that when the sale was affected, sale deed was scribed in the witness' Bahi, and was scribed in the plaintiff's Bahi after two months or 4 to 6 months. Thus, even according to this witness Ex.-1 is not the first

document of alleged transaction, but is a subsequent description, and the first document has not seen the light of the day. Then, it was submitted that Ex.-1, clearly purports to be a complete alienation of immovable property worth more than Rs. 100/-, and that being not registered, is not admissible in evidence. Then, it was also submitted, that the sale deed Ex.-2 is of a date, just a day before filing of the suit. As against which, the defendant had purchased the land way back on 5.2.74, by registered sale deed, and once the land was purchased by the defendant, even if it is shown to have been sold to the plaintiff vide Ex.-2, unless the plaintiff is able to show, that his seller had the title in the land, mere recital in that sale deed, is at best, a self serving admission, which is not admissible in evidence against the appellant. Then, regarding Ex.-3 it was submitted, that the learned courts below have proceeded with the assumption of proof of Ex.-3, while there is absolutely no evidence on record to prove Ex.-3, inasmuch as the scribe of this document being P.W.4 Chaturbhuj has simply deposed the document to have been scribed by him, and regarding thumb mark of Gheesa, he has not been able to identify the person putting thumb mark of Gheesa, and relied upon the attestation of thumb mark of Parasmal. As against which Parasmal has not deposed anything about this document, significantly notwithstanding the fact that the two documents Ex.-2 and Ex.3 are of the same date. Then, none of the attesting witness of Ex.-2 has

been produced, and thus, there is absolutely no evidence to prove Ex.-3. It was also submitted that even according to plaintiff, when the defendant encroached upon the land he approached Gheesa, and Gheesa gave out to have not sold the land, and executed Ex.-3. In this background again since two documents Ex.2 and 3 are of the same date, obviously there was no occasion for Gheesa to be available there on the date of execution of Ex.-2, which was executed by Parasmal in favour of the plaintiff. Then it was also submitted that in the plaint also there is no reference about this document Ex.-3, nor there is even any pleading about any agreement having been executed by Gheesa in favour of plaintiff, or even about any clarification having been made by Gheesa. Notwithstanding the fact, that P.W.4 the scribe of this document Ex.-3 has purported to depose the identification of thumb mark of Gheesha on Ex.3 to have been made by Parasmal. It was then submitted that apart from the fact that document Ex.-3 has not been proved, in any case in absence of the appellant being party to the document it is not admissible in evidence against the appellant. It was also submitted that significantly a look at the statement of P.W.6 the plaintiff shows, that he does not at all talk about Ex.-1 or even Ex.-2 and rather only talks about Gheesa having given to him in writing Ex. 3. Then, it was submitted that a look at the statement of P.W.1, who is the attesting witness of Ex.-1, does show, that he had clearly deposed the property to have been

purchased by the plaintiff in Samvat 2020, even in the plaint the property is alleged to have been purchased in Samvat 2020, which figure has been subsequently interpolated to 2021, inasmuch as the copy of the plaint, as served on the defendant, clearly mentioned the property to have been purchased in Samvat 2020, and P.W.1 also deposed that no Aaliya existed. Likewise this witness also deposed that at the time of sale Bhura Ram Sarpanch had come, and the property conveyed was measured, and then possession was delivered, whereas all other witnesses of the plaintiff depose that no such measurement was taken. Then, P.W.3 Hema Ram has been produced by the plaintiff, who purports to be an attesting witness of Ex.-1, but then, while in witness box he has not at all testified the document Ex.-1, and also deposed, that at the time of sale no documentation was effected, nor any measurement was taken. It was also submitted that the agreement Ex.-3 has been produced by the plaintiff at much latter stage of the litigation. It was then submitted that there is absolutely no evidence to establish, that this 2½ ft. land formed part of the land of Lichhman, and was sold by Lichhman to Parasmal, and Parasmal sold it to the plaintiff, so as to conclude that this land is established to be of the plaintiff, and the finding of the learned lower appellate court is outcome of misreading, or in any case, is based on no evidence.

Thus, it was submitted, that since the finding of the learned lower Appellate Court, is primarily based on the documentary evidence Ex.1, 2 and 3, allegedly corroborated by oral evidence, while the document Ex.-1 being unregistered sale deed, and Ex.-3 having not been proved in accordance with law, and in any case not being admissible in evidence against the appellant, and the document Ex.-2 being of the date subsequent to the defendant's sale deed Ex.A-1, the finding is clearly vitiated, as comprehended by the substantial question of law framed. It was then submitted, that a look at Ex.A-1 shows, that therein the property purchased by the appellant has been described by boundaries, and therein the eastern boundary has been shown to be the plaintiff's house, and not any open land, lying in between the property sold, and the plaintiff's house. Thus by that sale deed, the defendant purchased property upto the house of the plaintiff, and therefore, if subsequently in January 1975, a day before filing of the suit, the plaintiff happens to have executed sale deed with respect to portion of the property purchased by the defendant, then until and unless the plaintiff proves, that his seller had the right to sell that property, or in any case had better title than the defendant, the sale deed Ex.-2, by itself, would not be admissible in evidence against the appellant, to recognise the title of the plaintiff over the land, on the face of Ex.A-1. Thus, the findings of learned courts below were

sought to be assailed, and it was prayed, that the suit is liable to be dismissed.

On the other hand, learned counsel for the respondent submitted, that it is not in dispute, that the land was purchased by the plaintiff by a contract of sale, and that contract is by Ex.-1. Then, Ex.-2 is registered document. A distinction was sought to be made between the transaction of sale/contract of sale, and the execution of the document, purporting to be sale deed, and its registration, and it was submitted, that the contract of transaction of sale is by itself a definite event, and registration is only of bunch of papers, purporting to evidence that transaction, and therefore, Ex.-1 is clearly admissible in evidence, to show transaction of sale, which was perfected by registration of Ex.-2. It was submitted, that in view of the provisions of Section 49 of the Registration Act, may be that Ex.-1 cannot be admitted in evidence as sale deed, but then that does show, that transaction of sale did take place in 1961, wherein the land in question was also conveyed, and by the registration of Ex.-2, the transaction entered into in 1961 was perfected. Learned counsel read to me the provisions of Section 47 of the Registration Act, and submitted, that this provision is required to be interpreted in the manner, so as to relate back, not only to the date of the document, which has been registered, but is required to relate back

to the date of transaction, when it was initially entered into, inasmuch as had the registration been not required, Ex.-1 would have been valid, then by virtue of Section 47 it gets validated, and therefore, it will not be from the date of registration of Ex.-2. Replying the arguments of the learned counsel for the appellant, it was submitted, that even oral evidence of the sale is admissible to prove the fact of transaction having taken place, even though it may not prove valid sale, and that to corroborate transaction of sale, there may be more than one documents, and therefore, even if it were to be assumed, as deposed by Parasmal that there was some more previous document will not render inadmissible the subsequent document alone. It was contended that it is nowhere the case of the defendant that Ex.-1 is forged one, but it is only pleaded to be collusive, and even there is no cross-examination about the document to have not been executed, or to be a subsequent creation. It was then submitted, in the alternative, that even if Ex.-1 is not found to be admissible in evidence, still its effect would be, that the seller of the plaintiff could claim the land from him, and by inadmissibility in evidence of Ex.-1, the land does not happen to belong to the appellant. It was maintained that the document Ex.-2 was in furtherance of Ex.-1, and was prior to the date of the suit, and after encroachment of the defendant. Therefore, the plaintiff can very well maintain the suit. Then, it was submitted that the plaintiff had purchased the

land from Parasmal, and not Lachha, and therefore, non production of sale deed by Lachha, is of no consequence. Regarding absence of measurements it was submitted that even on the side of the defendant, it is not in dispute that in his east is the plaintiff's house, of which the plaintiff has got ownership, and this obviously means, that on the side of the plaintiff Ex.-2 is not in dispute, and that being so, it is not open to the defendant to bifurcate the document, and say that he admits the title of the plaintiff on the house, but does not admit title on the land in question. The other limb of argument was, that even if there be no chain of the document it is of no consequence, inasmuch as, title can be acquired by the plaintiff even by adverse possession, and that in any case the land in question was in possession of the plaintiff for the last more than 12 years from before the date of filing of the suit, thus he has clearly perfected his title, and on the defendant's encroaching the land, he has filed the present suit, which has rightly been decreed. It was also submitted that Parasmal is not a party to the litigation, and therefore, he could not be compelled to produce the document of sale deed by Lachha in his favour, and the provisions of Section 130 of the Evidence Act were pressed into service to substantiate this submission. It was also submitted that in any case no request was made even by the defendant for production of the document. This coupled with the fact that even in Ex.A-1, in the east is shown to be

the plaintiff's house, obviously land in question is established to be belonging to plaintiff. It was submitted that execution of document Ex.-3 by Gheesa is a natural conduct. Then, it was submitted that Ex.-3 was scribed by P.W.4, and not by Parasmal, therefore, he has not deposed anything with regard to Ex.-3 is of no consequence, and P.W.4 has proved the document Ex.-3. Then, the learned counsel cited the judgment of Hon'ble the Supreme Court in Gurbax Singh Vs. Kartar Singh, reported in AIR 2002 SC-959, Faijabi Devi Vs. Surendra Sil, AIR 1992 Guwahati-17, and Hero Vinoth Vs.Seshammal reported in 2006 DNJ(SC)-611, and submitted, that the registration is of the transaction, and not the document, therefore, the learned courts below were not at all in error, in referring to, and relying upon, Ex.-1, 2 and 3, and thus the impugned judgments do not require any interference. Learned counsel also relied upon the judgment of Allahabad High Court in Ganesh Vs. Sri Ram Lalaji Mahraj reported in AIR 1973 Allahabad-116, Ramanuja Naidu Vs. V.Kanniah Naidu reported in JT 1996(3) SC-184, and Subhaga Vs. Shobha reported in 2006(5) Supreme-372. It was also submitted that in any case in view of the proviso to Section 49 of the Registration Act the document Ex.-1 could be looked into, and was admissible in evidence for collateral purpose of being an agreement to sale. Learned counsel lastly submitted that the appeal is required to be decided only on the question as formulated, and it is not open to this Court to enter into re-appreciation of

evidence, and arrive at a different conclusion simply because the finding of fact are shown to be requiring interference, as attempted by the learned counsel for the appellant.

In rejoinder, learned counsel for the appellant submitted that it is nowhere the case of the plaintiff, that Ex.-1 is any agreement to sale, and a look at the document shows, that it is a complete document of sale, and is therefore, not admissible in evidence for any purpose. It was then submitted that reference of Section 130 is wholly misplaced. It was also submitted that for the sake of argument even if it is assumed that the appellant committed any trespass or encroachment, it might be on the land of Lachha, or if shown to have been purchased by Parasmal, then for that land Parasmal alone could have sued the defendant, but the plaintiff cannot maintain the present suit.

I have considered the submissions, and have gone through the record. During course of arguments of the learned counsel for the appellant, learned counsel for the respondent, time and again reminded me of my limitations to confine to the limitations prescribed under Section 100 C.P.C., and also reminded, that the matter is to be heard only within the four corners of the substantial question of law, as framed. Learned counsel for the respondent also

relied upon the two judgments of Hon'ble the Supreme Court in this regard, being in Ramanuja Naidu's case and Hero Vinoth's case. The principles propounded therein can no more be said to be in dispute. Rather in Hero vinoth's case it has clearly been held, that the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Then, it has also been held, that a substantial question of law will also arise in a situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring, or acting contrary to, such legal principle, and in the such type of cases the substantial question of law arises, not because the law is still debatable, but because the decision rendered on a material question violates the settled position of law. Obviously I have heard the matter within the above four corners only and have considered the submissions within the framework of law, and my permissible limits, and I now proceed to examine the matter within the said limits only.

At the outset it may be observed that there are some undisputed facts, as emerge from the record, being that the entire land earlier belonged to three persons Lachha, Gheesa and Chuna, which was divided by them, the eastern portion fell to share of Lachha, to its west fell

to the share of Gheesa, and then in further west to the share of Chuna. It is also not in dispute, that Parasmal purchased the land from Lachha, and plaintiff purchased from Parasmal. Likewise it is also not in dispute, that in the immediate west of the plaintiff, the defendant purchased the property from Gheesa. It is also not in dispute, that the defendant purchased the property vide Ex. 1 and 2, the east west measurement of the property is not mentioned. It is also not in dispute, that the controversy only relates to the portion of the land "E F H I", and obviously the construction raised thereon.

In this background it may be noticed here, that Ex.-2 is dated 10.2.75, and is registered on the same day.

The precise question, rather the central question, necessary for adjudication of the case, is covered by issue no.1, being as to whether the land in question is purchased, and possessed by the plaintiff, and is of his ownership. Obviously if this question is decided, or is not to be decided, in favour of the plaintiff, the other reliefs may follow. A look at the impugned judgment shows that the learned courts below have concluded this question in favour of plaintiff, primarily by relying upon Ex. 1, Ex. 2 and Ex.3, and finding them to have been corroborated by the oral evidence, led on the side of the plaintiff, comprised of P.W. 1 to P.W.6, and the fact, that the

defendant has not been able to rebut that evidence.

In that background I may revert to the substantial question of law framed, being as to whether the learned courts below misread the evidence on record, and considered inadmissible evidence. Therefore, it is to be examined, as to which of the inadmissible evidence has been taken into account by the learned courts below, and how the evidence has been misread by the learned courts below. To start with, I may straight-way take up Ex.-1. I will do better, if I simply reproduce Ex.-1 verbatim, which reads as under:-

" नकल बही

लिखी 1 कर दीनो भाडीयार सुकराम जी बगसाराम बेटा पोता जेठाजी भास बीटण वाला ने करदीन सेठजी पारसमलजी उगमराम बेटा पोता मिसरीमलजी व हमारो मकान आपने दीनो गोदारा भास मे हैं जीणा साल दोय भणीयड़ हैं बाकी ताल पड़ीया न मा साल मे पुट लार आल है सुकरामजी रा लार जमीन पुट 2½ ढाई हैं मकान रे लारे है सो सामील हैं जीणा पाड़ौस नीचे मुजब हैं धुख पासवड़ चोईल श्रीरामजी रा मकान छः आतुण पासवाड धमामी गीसा रा मकान छः उगाण पासवाड़ चौक छः दीकण पासड़ मारग छः, इण भीचलो मकान हमा तुमने भेजान दीनो हैं जीणारा रूपया 2500/- में पाचीसो में भाचीया हैं रूपया रोकड़ लेय लीना हैं हमारी कोई तरारो उजर नाई सा मकान आप भोगासी सं. 2021 रा जेठ सुद 11

दः पारसमल रा छः उपर लीखीया मुजब सही छः

o साख 1 जाट सीयाग हेमाराम री छः

o ओ नीसान इशरसिंह रो छः

o नि. गोदारा पेमाराम "

Thus, a look at this document shows, that this purports to be complete sale, conveying the property, comprising of two Saals, open land, and in the rear wall of the Saal there is a Aala, and further there is 2½ ft. open land, which is included in the sale deed. By this document immovable property is purportedly sold for Rs. 2500/-. It would straight way suffice to say, that on the face of language of Section 54 of the Transfer of Property Act, such sale can be made only by registered instrument, and so also according to Section 17 of the Registration Act such document is required to be registered, and then by virtue of Section 49, such document cannot received as evidence of any transaction, effecting such property, or conferring such power. Thus, on a combined reading of these provisions, being Section 54 of the Transfer of Property Act, Section 17 and Section 49 of the Registration Act, the document Ex.-1 is clearly inadmissible in evidence, rather cannot be received even as evidence of any transaction effecting such property.

At this stage I may consider the submissions made by the learned counsel for the respondent viz. that the transaction/contract of sale is independent of the execution of the document, purporting to be the sale deed, and its registration. It was submitted that the transaction of sale by itself is definite event, and registration is

only of bunch of papers, purporting to evidence that transaction, and therefore, Ex.-1 is admissible to show that transaction of sale, which is just perfected by registration of Ex.-2, and that, in view of the provisions of Section 49, even if it cannot be admitted in evidence as a sale deed, but then it does show, that the transaction of sale did take place, at that time, wherein the land in question was also conveyed, and that transaction was perfected by execution and registration of Ex.-2.

In my view, the argument is only articulately framed, having no legal support, or basis, inasmuch as, by virtue of Clause (C) of Section 49 the document like Ex.-1 cannot be received even "**as evidence of any transaction**" effecting such property. Thus, the bar enacted by Section 49 is against any piece of paper being received as evidence of any transaction required to be effected by a registered document. Thus, Ex.-1 is clearly an inadmissible document, which has been positively relied upon by the learned courts below.

Then a look at the findings of the learned lower Appellate Court further shows, that the plaintiff's statement has been recapitulated about having purchased the property in Samvat 2021 which included the land in question. Then, he raised construction upstairs and 5 to 7 stones were embedded to mark his land. Then, there was 5ft.

high wall east to west 2½ ft. long, on which land the defendant has encroached, and this construction was raised when the plaintiff was in district Sagar, on receiving information he contacted Gheesa, who gave out to have not sold the land to defendant, and executed the agreement Ex.-3, and Site Inspection Note Ex.-4 was prepared by Advocate Banshi Lal. Significantly, the plaintiff does not talk anything about Ex. 1 or Ex.2, much less does he prove them, and he has not deposed to have been delivered possession of this disputed land.

Then, the learned court below has considered the evidence of P.W.3 who has deposed that the plaintiff has purchased the land from Parasmal at which time there were two Saals, and there was open land on both the sides, i.e. 2½ ft. land was there in the rear side. Then, the plaintiff raised construction on the upper storey, and that at the time of purchase he was there on the spot, and at the time of purchase he saw plaintiff's possession over the land. He has also deposed that the defendant purchased land from Gheesa, and at that time he encroached upon the plaintiff's land. Suffice it to say that a look at Ex.-1 shows, that this P.W.3 purports to be an attesting witness, but then he has not testified to Ex.-1. This aspect has not been referred to by the learned court below. Then, the evidence of P.W.1 has been mentioned only by observing " ऐसा ही कथन पी.ङ 1 ईश्वरसिंह इसी बिन्दू पर कर रहा हैं।". This is a patent

misreading of the statement of P.W.1 Ishar Singh, inasmuch as according to Ishar Singh, the property was purchased in Samvat Year 2020. He deposed that the possession was delivered at that time, and he had attested the document as attesting witness. However, he has further deposed that Lachha had sold his 1/3rd portion to Parasmal which was sold by him to plaintiff. He has further categorically deposed, that at that time Bhura Ram Sarpanch was there, who had measured the land, and then possession was delivered. I am not re-appreciating the evidence, by considering the statement of this witness about not knowing as to what was written, or the discrepancy about consideration etc., as that may not be within my scope. But then, this has not been considered by the learned courts below, that according to this witness Bhura Ram Sarpanch had measured the land, and then the possession was delivered. Though this is nobody's case, including the plaintiff, that the land was measured on the site at the time of sale, rather the seller Parasmal P.W.2 has clearly deposed, that land was not measured at that time. Thus to consider the evidence of P.W.1, as completely supporting the plaintiff's case, by mentioning above lines, is clearly misreading of his evidence. Then, the learned lower Appellate Court has considered the evidence of Parasmal about having sold the property including the rear land, and to have delivered the possession. This witness has also deposed to have executed, and has proved Ex.-2, and has also deposed to have got it

registered. The learned court below has not considered from his evidence, firstly, that even according to him boundary wall was constructed on the front portion, that the land was not measured at the time of delivery of possession, that the measurements of the land purchased by him from Lachha was mentioned in the sale deed in his favour. Admittedly that sale deed has not been produced. Then, he has also admitted that prior to Ex.-1 some more document had been executed, regarding this land in favour of the plaintiff, and that the measurements are not mentioned even in Ex.-2.

Then, the learned court below has considered the evidence of P.W.4, who is scribe of Ex.-2 and also Ex.-3. So far Ex.-2 is concerned, its execution, and proof need not detain me, because that is not in dispute. Then, the learned court below has relied upon this witness as scribe of Ex.-3, to have been scribed at the behest of Gheesa, who has signed on Ex.-3 in his presence, and document was attested by Baksha Ram and Shishpal Singh in his presence. Suffice it to say, that while referring to evidence of this witness, learned court below had not read part of the statement of this witness, where he had deposed, that Gheesa was identified only by Parasmal at A to B, two documents Ex. -2 and Ex.-3 are of the same date, he cannot say as to whether he knew Gheesa from before or not, as it is likely that he may be knowing him by face, and only

after seeing him he can say with certainty that thumb mark is of Gheesa or not, and therefore, he cannot say that the person putting thumb impression on Ex.-3 was of Gheesa or some-body-else. Omission to consider this part of the evidence is of great significance, as thereby the very proof of execution of Ex.3 lends in turmoil, more particularly because, Parasmal, who is said to have identified Gheesa, and who is examined as P.W.2, significantly, does not depose a word about Ex.3, or about thumb mark of Gheesa. Thus, non reading of this part of the evidence also clearly amounts to misreading of the evidence of P.W.4 Chaturbhuj. Thus, after recapitulation of the evidence of the plaintiff, so misread, on significant and material aspects, the learned court below has straight-way jumped to three documents, and concluded, that in all these three documents 2½ ft land has been shown to be situated between the houses of the parties, which is included in the plaintiff's land, and Gheesa and Parasmal have deposed this land to be included in the plaintiff's land, and left for light and air, which evidence has not been rebutted by the defendant.

Significantly the document Ex.A-1 has not at all been considered by the learned courts below, which is a million dollar circumstance after Ex.-1, as found above to be inadmissible. A look at Ex.A-1 shows, that therein the land conveyed has been described by boundaries, and in the

east is shown to be house of Sukh Ram (plaintiff). At this place also I may refer to, and rely upon, judgment cited by the learned counsel for the respondent, in Subhaga's case, wherein it has been held by the Hon'ble Supreme Court, that "**a property can be identified either by boundary or by any other specific description is well established**". Obviously no other description has been given, and therefore, by Ex.A-1 the land sold to the defendant was to the extent of Sukh Ram's house, towards the east. In that view of the matter, the learned courts below were required to consider that the document Ex.-2 is of dt. 10.2.75, while Ex.A-1 is as old as 5.2.74. Obvious consequence is, that if the particular property is included in the sale deed of the defendant executed in the year 1974, then in order to entitle the plaintiff to claim back possession of that property, on the basis of document Ex. -2, the plaintiff has to establish his title over the land, and that too by proving the complete chain of title, to be vesting in his predecessor in interest.

Learned counsel for the respondent pressed into service the provisions of Section 130 of the Evidence Act and contended, that witness Parasmal cannot be compelled to produce his document of title, more particularly when he is not a party to the lis. It would suffice to observe, that if a dispute arises about the title to the property conveyed by Parasmal to plaintiff, then in order to entitle

the plaintiff to claim the property, he has to prove the title, more particularly in the circumstances of the present case, where the defendants claims to be a prior title holder, and for that purpose, obviously, the title deeds in favour of Parasmal were significant to show if he has purchased the land from original owner, his predecessor in title, and was necessary to be produced and proved, and for that, the bar of Section 130, in my view, does not at all come into play. In the present case the learned courts below have not considered, that even according to Parasmal measurements of the land are given in the sale deed executed in his favour, but that sale deed has not been produced. Then, in the sale deed Ex.1 or Ex.2 measurements are not given, and therefore, on the face of Ex.A-1, the recital of 2½ ft. land on the rear side to be included in the sale deed is no better than a self serving admission, which is not admissible against the defendant, who is not a party to that document, more particularly when the parties are at issue, and the plaintiff has to independently prove to have acquired right/title over that land also. A combined reading of the statement of P.W.1 and P.W.2 specially the various parts of the statement read by the learned courts below, viz. according to P.W.1, Bhura Ram Sarpanch took measurements of the land, and possession was given, while according to seller Parasmal no measurements were taken, if this part of the evidence were read by the learned court below, there was no escape from the

conclusion, that the plaintiff has utterly failed to prove, that the disputed land was ever delivered possession of by the seller. Thus, by the non reading (misreading), of material evidence, and despite absence of any proof of title over the land in question to be vesting in favour of the plaintiff, and despite the defendant being not party to Ex.2, and thereby Ex.2 being of no adverse consequence to defendant, Ex -1 clearly being inadmissible, and relying on them the findings have been recorded by the learned courts below, which are clearly vitiated, on the grounds contemplated by the substantial question of law, as framed.

At this place also I may consider Ex.3, and its admissibility. It is established that in order to take any document to be admissible in evidence, the document is also required to be proved, and the learned courts below have erred in not dilating on the aspect of proof of Ex.3. I have already referred to above, the evidence led on the side of the plaintiff regarding Ex.3, and omission of reading that evidence by the learned court below. Even at the cost of repetition it may be observed, that the plaintiff P.W.6 does not prove Ex.3., Parasmal P.W.2, who is said to have attested the document Ex.2 and deposed his signatures on Ex. 2 to be from A to B, C to D and E to F, G to H, and I to J, but does not depose anything about Ex.3, and from the evidence of Chaturbhuj P.W.4, specially the portions which have not been read by the learned courts

below, it is clear, that he does not prove the thumb mark to be of Gheesa. Admittedly neither of the two attesting witnesses has been produced. Thus, it can very safely be said, that there is absolutely no legally admissible evidence on record to prove Ex.3, and obviously in absence of proof, Ex.3 could not be used against the appellant. I am not dilating on the aspect, as to whether such document could be executed by Gheesa, behind the back of the defendant, and as to whether even if Gheesa were to execute such document, it could, or could not, adversely affect the sale deed Ex.A-1, obviously because Ex.3 is not at all proved. Thus, it is clear, that neither Ex.1 could be used against the defendant, nor Ex.3 could be used against the defendant, being not legally admissible, and having not been proved, and in absence of chain of title, Ex.2 either, could not adversely affect the title of the defendant on the face of Ex.A-1.

Then, I may also consider the submissions made by the learned counsel for the respondent, that by registration of Ex.2, the sale that took place in 1961 got perfected by virtue of Section 47, by relating back to the date of Ex.1, more particularly when it is not the case of the defendant, that Ex.1 is forged document, or was not executed on the date it purports to have been executed. Coming to the judgments relied upon by the learned counsel for the respondent, in Faijabi Devi's case, the provisions

of Section 47 were considered in the circumstances, that two documents were produced, one was executed on 13.9.78, and was registered on 22.11.78, while the other document was executed on 19.9.78, and was registered on the same date. Thus subsequent document was registered prior to previous document, and thus the question for consideration was, as to which of the two documents are to have effect over the property, and by relying upon Section 47 of the Registration Act, it was held, that previously executed document will have the effect, even though it was registered later on, as it has nothing to do with the completion of registration. Then in Gurbax Singh's case also two documents were executed on the same day, and the question was, as to which of them was to prevail, and in this case also referring to Section 47 it was held, that one which is executed earlier in time, will prevail over the other executed subsequently, irrespective of the time of registration.

Now I may straight-way refer to provisions of Section 47 of the Registration Act, which reads as under:-

> "47. Time from which registered document operates- A registered document shall operate from the time which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

In my view the very language of Section 47 is a

complete answer to all the arguments made by the learned counsel for the respondent, about the distinction drawn between the transaction, and the document, and its registration, so also about the argument of Ex. 2 relating back to Ex.1, and thereby Ex.1 becoming admissible in evidence, or about the possibility of there being more than one documents, to evidence the transaction of sale. According to Section 47, it is the document that is registered, that is to operate from time which it would have commenced to operate if no registration thereof had been required. Obviously if the registration were not required, Ex.2 would have operated from 10.2.75 only, and not from Samvat 2021. It is only if Ex.1 were registered, if permissible, even in the year 1975, then obviously that would have operated from 2021, but then by registration of Ex.2 it can, by no stretch of imagination be said to have the effect of operating from any antecedent time, which is not in accordance with law. Thus, the submissions made by the learned counsel for the respondent, on this anvil, are required to be, and are negatived.

Then, I take up the argument of the learned counsel for the respondent about the plaintiff being in possession of the land in question for the last more than 12 years before the date of filing of the suit, and thereby having perfected his title. Suffice it to say, that as found above, there is absolutely no legally admissible

evidence to show, that the plaintiff was delivered possession of the land, 12 years before filing of the suit. Significantly even a look at the plaint would show, that it has nowhere been the case of the plaintiff, about his having perfected the title over the land, even on account of his being in possession for the last more than 12 years since before filing of the suit. On the other hand in para 3 of the plaint, the plaintiff rather pleaded, that if the plaintiff's ventilator and windows are closed, the plaintiff would be deprived of the light and air, as it would result into substantial loss. Thus, even in view of the pleadings, the contention cannot be entertained. Perfection of title by adverse possession is pure question of fact, which is required to be pleaded, so that parties have notice of the plaintiff’s case, and has to be proved also. Learned counsel also referred to the judgment of Hon'ble the Allahabad High Court in Ganesh's case, but even after reading the whole judgment, I am not able to make out, as to how does it helps the plaintiff.

The net out come of the above discussion is, that the substantial question of law, as framed, is required to be, and is, answered against the respondent. The finding of the learned courts below on issue no.1 is set aside, and obviously as a consequence thereof the findings on issues no. 2, 3 and 4 are also required to be set aside, and the findings on other issues become meaningless.

Consequently, the appeal is allowed. The impugned judgments and decrees are set aside, the plaintiff's suit is dismissed. The parties are left to bear their own costs throughout.

( N P GUPTA ),J.

/Sushil/